CF0000063379

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (MP)

Criminal Appeal NO. 563 /2000

Division Bench (Criminal)

Appellant (In Jail) : Baraturam, son of Ankaloo Marar, aged about 26 years, Occupation: Agriculture, R/o village Pinkapa (Khairwartola), P.S. Dongargarh, Distt. Rajnandgaon (MP).

Versus

Respondent : State of Madhya Pradesh, Through Police Station Dongargar Distt. Rajnandgaon (MP).

Filed on ... by Shri ... Advocate

DEFECTIVE

CONVICTION	SENTENCE
U/S 376(1) I.P.C. R/W Sec.3(2)(5) of SC/ST, Prevention of Atrocities Act, 1989	Life Imprisonment and fine of Rs. 5000/- in default of fine Additional R.I. for 6 months.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CRIMINAL PROCEDURE CODE -1973

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आदेश पत्रक

मामला क्रमांक Cr.A.No.569/2000 **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -
Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. V.K. Shrivastava, JJ.

10.10.2006

Mr. Amiyakant Tiwari, Advocate for the appellant.

Mr. Akhil Mishra, P.L. for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J: -

This appeal is directed against the judgment of conviction & order of sentence dated 5th January, 2000 passed by learned Special Judge, Rajnandgaon in S.T. No.63/99, whereby learned Special Judge after holding the accused/appellant guilty for commission of offence under Section 376 (1) of the I.P.C. and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989') sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to further undergo R.I. for 6 months.

The prosecution case, in brief, was that on 25.2.1999 at about 11.00 a.m. when the prosecutrix along with Fagni went to the field for cutting grass, at that time accused Baraturam appeared on the scene and committed rape on the prosecutrix forcibly and the said act was witnessed by Fagni. On the same day at about 3.30 p.m. the matter

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was reported by the prosecutrix in the Police Station Outpost Chichola, from where matter was sent to the Police Station Dongergarh, on which the Station House Officer registered the case under Section 376 (1) of the IPC. The Investigating Officer took up the investigation, seized the underwear of prosecutrix under Ex.P-2 and prepared the site plan (Ex.P-3) of the place of occurrence. Patwari Shri Ramnath Sahu also prepared the site plan Ex.P-4. The prosecutrix was sent for medical examination to Government Hospital, Dongergarh where Dr. (Mrs.) Jyoti Sadani (PW-5) of Community Health Centre, Dongergarh, examined the prosecutrix and opined that on internal examination except pain, no other sign of forceful sexual assault has been found, however, two vaginal smear slides and pubic hair have been taken, sealed and handed over to the female police constable for chemical examination. Accused-Baraturam was also sent for examination regarding his potency for sexual intercourse. Dr. Rajesh Sadani (PW-6) of Community Health Centre, Dongergarh, examined the accused, opined that accused was competent to perform sexual intercourse and gave his report (Ex.P-6).

After completion of usual investigation, charge sheet was filed against the accused/appellant in the Court of learned Special Judge, Rajnandgaon for commission of offence under Section 376 (1) of IPC and under Section 3 (2) (v) of the Act of 1989. The prosecution in

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order to establish the charge against the accused/appellant examined 11 witnesses. On the other hand, statement of accused/appellant was recorded under Section 313 of Cr.P.C. in which he denied the material appearing against him in the prosecution evidence. He has also stated that he was not competent to perform sexual intercourse and on the fateful day when the prosecutrix was damaging the crop in his agricultural field, he asked her not to do so, on which she lodged a false report against him.

Learned Special Judge, after hearing the arguments of learned Additional Public Prosecutor & learned counsel for the accused, convicted and sentenced the accused, as mentioned in para 1 of this judgment.

We have heard Mr. Amiyakant Tiwari, Adv. for the accused/appellant and Mr. Akhil Mishra, P.L. for the State.

Learned counsel for the accused/appellant argued that the evidence of prosecutrix does not inspire confidence, as no external injury was found on the body of prosecutrix. Moreover, the evidence of Fagni (PW-8) also does not inspire confidence, for the reason that she has not stated that she saw the accused committing rape on the prosecutrix. He also submitted that no definite finding was given by the doctor that rape was committed on the prosecutrix and the accused was competent to perform the sexual intercourse.

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On the other hand, learned Panel Lawyer for the State supported the judgment of the trial court.

In order to appreciate the arguments advanced by learned counsel for the accused/appellant, we have perused the evidence and record of the trial court.

The prosecutrix (PW-1) has stated in her evidence that on 25.2.1999 at about 11.00 a.m. she went to the field for the purpose of cutting grass, accused/appellant came from behind and after catching her from shoulders threw her on the ground. When she tried to raise cries, accused closed her mouth with the hands. Fagni (PW-8), who was with her, on seeing this became frightened and ran away. Thereafter, accused after removing her garments committed rape on her and after committing rape on her he ran away. She immediately came to her house and informed her uncle & aunt about the incident. Her father was not well, therefore, she disclosed about the incident to her uncle & aunt, however, later on, her father also came to know about the incident. Thereafter, the matter was reported in the police Outpost Chichola under Ex.P-1. Evidence of prosecutrix has been corroborated by Fagni (PW-8), who has stated that on the fateful day she and prosecutrix went to the field for cutting grass, when they were busy in cutting grass the accused came from behind, threw the prosecutrix on the ground. On seeing this, she became frightened and

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ran away. However, after some distance she stopped and thereafter prosecutrix came to her and informed that accused Baraturam has committed rape on her. Thereafter, they went to the Village Kotwar. In the cross-examination of these witnesses, the defence has not been able to bring on record any circumstance by which it can be inferred that the prosecutrix has implicated the accused in a false case. Moreover, from the statement of accused/appellant himself, it has been established that on the fateful day, in fact, the prosecutrix went to the field for cutting grass and accused asked her not to damage the crop of his agricultural field. This statement of the accused/appellant shows that the accused and the prosecutrix were in fact present on the place of occurrence. It is unbelievable that on merely asking the prosecutrix not to damage the crop, the prosecutrix will implicate the accused in a false case that too at the cost of her reputation. In the Indian society an unmarried girl, even if the offence is committed against her, is hesitant in reporting the matter to the police because it involves her prestige as well as prestige of her family.

As far as the argument raised by learned counsel for the accused/appellant that no external injury was found on the body of prosecutrix, which suggests that rape was not committed on the prosecutrix is concerned, there is nothing on the record to show that

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the place where rape was committed was rough or some other particles of hard surface were there, therefore, merely on this ground that external injuries were not found on the body of prosecutrix, the case of the prosecution cannot be thrown away.

As far as the evidence of Fagni (PW-8) is concerned, she has categorically stated that when the accused threw the prosecutrix on the ground, she became frightened and ran away from the place of occurrence. However, she stopped at some distance where after some time the prosecutrix came and disclosed to her that accused has committed rape on her. As has been mentioned earlier that the presence of the accused and the prosecutrix at the spot at the time of occurrence is established and Fagni (PW-8), who is a child witness aged about 9 years, has stated that whatever was seen by her, she has not exaggerated the facts in any manner. Therefore, the fact to the extent that the accused threw the prosecutrix on the ground is established by her evidence and further the prosecutrix herself has stated that accused committed rape on her.

As far as the competence of the accused/appellant to commit rape is concerned, Dr. R. Sadani (PW-6) examined the accused/appellant and he gave the certificate (Ex.P-6) in which he has specifically opined that the accused was competent to perform sexual intercourse. Therefore, we do not find any substance in the argument

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of learned counsel for the accused/appellant that the accused was not competent to perform the sexual intercourse.

As far as argument of learned counsel for the accused/ appellant that as per medical report of Dr. (Mrs.) Jyoti Sadani that definite opinion cannot be given regarding the rape on the prosecutrix is concerned, Dr. (Mrs.) Jyoti Sadani has been examined as PW-5 and she has stated that the prosecutrix was unmarried and secondary sex character were fully developed, breasts were fully developed, vulva was fully developed and on insertion of finger in the private part of the prosecutrix, she was feeling pain, her hymen was elastic, therefore, it can be said that either rape was committed on her or not committed, but on account of pain it can be said that rape was committed on her. Therefore, the evidence of the doctor (PW-5) is not suggestive of the fact that in all probabilities rape was not committed on the prosecutrix. In the cross-examination, she has stated that hymen are of many kinds, they are elastic also and it is not necessary that if the rape is committed on a woman having elastic hymen, then in all probabilities the hymen has to be ruptured. As has been mentioned earlier that the prosecutrix has categorically stated that the accused committed rape on her and there is no reason to disbelieve the evidence of the prosecutrix. Therefore, the finding of the court below to the extent that the accused committed rape on

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the prosecutrix is based on the legal and clinching evidence and there is no reason before us to differ from the finding of the trial court and the trial court has rightly convicted the accused for commission of offence under Section 376 (1) of the IPC.

As far as conviction of accused/appellant under Section 3 (2) (v) of the Act is concerned, Section 3 (2) (v) envisages that "*whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.*" Therefore, in order to bring the act of accused within the mischief of this provision, it is the duty of the prosecution to establish that the accused has committed the offence on the prosecutrix on the ground that she was a member of a Scheduled Caste or Scheduled Tribe and in order to belittle the victim, as he or she belongs to Scheduled Caste or Scheduled Tribe. There is nothing on the record to infer that the accused/appellant had committed rape on the prosecutrix in order to belittle or damage her reputation on the ground that she was a member of Scheduled Tribe. Therefore,

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	the conviction of the accused/appellant for commission of offence under Section 3 (2) (v) of the Act cannot be sustained. In the result, the appeal of appellant Baraturam partly succeeds while maintaining his conviction under Section 376 (1) of the IPC, the sentence imposed on the accused/appellant in that section being excessive is set aside and instead of that accused/appellant is sentenced to undergo R.I. for 7 years. The conviction and sentence imposed on the accused/appellant under Section 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is also set aside and accused/appellant is acquitted of that charge. Accused/appellant is said to be in detention since 12.4.1999 and thereby he has already completed 7 years of sentence, as such, he be set at liberty forthwith, if not required in any other case. **Sd/-** **L.C.BHADOO** **Judge**	**Sd/-** **V.K. Shrivatava** **Judge**

Roshan/-

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28.10.06 8.11.06